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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

BLOCKTREE PROPERTIES, LLC, a Washington limited liability company; CORSAIR INVESTMENTS WA, LLC, a Washington limited liability company; CYTLINE, LLC, a Delaware limited liability company; 509 MINE, LLC, a Washington limited liability company; MIM INVESTORS, LLC, a Washington limited liability company; MINERS UNITED, LLC, a Washington limited liability company; TELCO 214 WHOLESALE SOFTWARE, INC., a Washington limited liability company; MARK VARGAS, an individual; and, WEHASH TECHNOLOGY, LLP, a Washington limited liability company.

## Plaintiffs,

V.

PUBLIC UTILITY DISTRICT NO. 2  
OF GRANT COUNTY

No. 2:18-cv-00390-RMP

**DEFENDANTS'  
MEMORANDUM IN  
OPPOSITION TO  
PLAINTIFFS' MOTION FOR  
PRELIMINARY  
INJUNCTION**

**NOTED FOR MARCH 19, 2019**

DEFENDANTS' MEMORANDUM IN  
OPPOSITION TO PLAINTIFFS' MOTION FOR  
PRELIMINARY INJUNCTION - i



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1 WASHINGTON, a Washington  
 2 municipal corporation; TERRY  
 3 BREWER, individually and in his  
 4 official capacity; BOB BERND,  
 5 individually and in his official capacity;  
 6 DALE WALKER, individually and in  
 7 his official capacity; TOM FLINT,  
 8 individually and in his official capacity;  
 9 LARRY SCHAAPMAN, individually  
 10 and in his official capacity; and DOES  
 11 managers and employees of Grant  
 12 County PUD, individually and in their  
 13 official capacities,

14  
 15 Defendants.

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Feldman** LLP

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DEFENDANTS' MEMORANDUM IN  
OPPOSITION TO PLAINTIFFS' MOTION FOR  
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1 Defendants, Public Utility District No. 2 of Grant County, Washington  
2 (the “**District**”) and Terry Brewer, Bob Bernd, Dale Walker, Tom Flint, and  
3 Larry Schaapman (collectively, the “**Commissioners**”), by and through their  
4 undersigned counsel, respectfully request that the Court deny Plaintiffs’  
5 Motion for Preliminary Injunction (“**Motion**”).  
6  
7

## I. INTRODUCTION

9 The Plaintiffs are large consumers of electric power seeking to avoid an  
10 increase in their electricity rates. They are frustrated with the outcome of an  
11 approximately year-long process that resulted in the establishment of a new  
12 rate class, which includes Plaintiffs, and the setting of rates for that new class  
13 that will take effect April 1, 2019. The District is governed by five elected  
14 Commissioners that, as a body (the “**Commission**”), have the exclusive  
15 authority and responsibility to establish the rates the District charges for  
16 electric service. Wash. Rev. Code (“**RCW**”) 54.12.010, 54.16.040 and RCW  
17 54.24.080(1). The Commission lawfully exercised that authority when it  
18 adopted the rate schedule challenged here.  
19  
20

22 Through this lawsuit, Plaintiffs invite this Court to second guess the  
23 Commission’s decision to adopt the challenged rate schedule and ask the  
24  
25

DEFENDANTS’ MEMORANDUM IN  
OPPOSITION TO PLAINTIFFS’ MOTION FOR  
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1 Court to substitute its judgment for that of the Commission. There is no  
2 factual or legal basis for this Court to do so, and no basis for this Court to  
3 grant extraordinary preliminary injunctive relief.  
4

5 Plaintiffs have not, and cannot, establish that the District or its  
6 Commissioners acted in an arbitrary fashion when adopting Rate Schedule 17  
7 (“**RS 17**”), or that there has been any violation of applicable state or federal  
8 statutes, let alone the state or federal Constitutions. Further, Plaintiffs will  
9 not suffer irreparable harm if the Court denies their request for preliminary  
10 injunction because the District has committed to refunding incremental  
11 charges in the unlikely event Plaintiffs were to ultimately prevail. Nordt  
12 Decl. ¶ 10.2, Ex. 10. Moreover, the equities weigh in favor of the District. If  
13 an injunction were granted it would hamper the District’s ability to develop  
14 appropriate electric rates and to protect existing ratepayers from burdensome  
15 costs they did not cause. Likewise, the public interest is best served by  
16 allowing the District, acting through its elected Commissioners, to serve the  
17 needs of all of its customers through the establishment and implementation of  
18 electric power customer classes and rates.  
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DEFENDANTS’ MEMORANDUM IN  
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1           **II. FACTUAL BACKGROUND**

2           **A. The District Serves the Electricity Needs of Grant County  
3           Customers.**

4           The District is a municipal corporation organized under Title 54 of the  
5           Revised Code of Washington. It provides electric service to retail customers  
6           in Grant County, a rural agricultural community. Nordt Decl. ¶¶ 5.1; 5.4.  
7

8           The District is obligated to serve the electric power demands of its  
9           customers. Nordt Decl. ¶ 5.5. It produces power from its hydroelectric  
10          facilities on the Columbia River and has some of the lowest retail electric  
11          power rates in the United States. ECF No. 32-1 at 656. This inexpensive  
12          power is attractive to large consumers of electricity.  
13

14          The Commission establishes electric power rates based upon the  
15          District's cost to supply electric power. Nordt Decl. ¶ 4.1. Customers do not  
16          all pay the same electric rates. Instead, customers are grouped, based on  
17          industry type, into various rate classes. *Id.* at ¶ 4.2. Each rate class has its  
18          own rate schedule, which details the rates a customer taking service under the  
19          rate schedule will be charged. *Id.* Ex. 1 (showing Rate Schedule 7).  
20  
21          Currently, the District maintains 13 different rate classes. *Id.*  
22  
23

1                   **B. The Flood of New Service Requests Presented by the**  
 2                   **Cryptocurrency Industry was Unprecedented.**

3                   Plaintiffs are existing District retail customers who use low-cost power  
 4                   to mine cryptocurrencies. Electricity represents the cryptocurrency industry's  
 5                   primary operating cost. *Id.* at ¶ 6.6. During the summer of 2017, the District  
 6                   began to receive an unprecedented number of new service requests. *Id.* at ¶  
 7                   6.1; ECF No. 32-1 at 457. Since 2017, the District has received  
 8                   approximately 125 requests for service representing over 2,000 megawatts  
 9                   ("MW") of new electric load (most of which are from the cryptocurrency  
 10                  industry), more than three times the District's current average load of almost  
 11                  600 MW. *Id.* The number of new service requests and the volume of electric  
 12                  power needed to meet this demand are extraordinary. *Id.* The District's  
 13                  existing rates, particularly Rate Schedule 7 ("RS 7") were based on historical  
 14                  trends for retail power demand and did not account for the costs associated  
 15                  with providing this additional service.<sup>1</sup> ECF No. 32-1 at 457–58.

20  
 21  
 22  
 23  
 24                  <sup>1</sup> Plaintiffs are currently served under RS 7. Nordt Decl. ¶ 4.3.  
 25

1                   **C. The Cryptocurrency Industry's Characteristics are Different  
2                   from other Load the District Serves.**

3                   In response to the influx of service requests from the cryptocurrency  
4                   industry, the District, under the direction of the Commission, undertook a  
5                   review of the cryptocurrency industry to determine the potential impacts  
6                   serving this load is likely to have on the District and its customers. ECF No.  
7                   32-1 at 458; Nordt Decl. ¶¶ 6.2–6.7. The District discovered that, unlike  
8                   traditional customers, the cryptocurrency industry and its demand for  
9                   electricity is prone to volatility. ECF No. 32-1 at 464; Nordt Decl. ¶ 6.6. The  
10                  industry is extremely sensitive to cryptocurrency market conditions and the  
11                  cost of electric power. It is also generally very mobile. *Id.* Conclusions  
12                  regarding the unique characteristics of cryptocurrency and a study plan to  
13                  develop an approach for electric service to the industry were presented to the  
14                  Commission at an open public meeting on October 24, 2017. Nordt Decl.  
15                  Ex. 2.

16                  **D. The Evolving Industry Customer Class Resulted from  
17                  Painstaking Analysis.**

18                  Between October 2017 and April 2018, District Staff (“Staff”) studied  
19                  how to best address cryptocurrency’s power demand and its impact on  
20                  District operations. Nordt Decl. ¶ 7.1. On April 17, 2018, Staff produced an  
21

internal memorandum (the “**White Paper**”) detailing its analysis and recommendations for addressing the issues associated with serving these new and unique customers. ECF 32-1 at 457–66. Staff assessed several alternatives but ultimately concluded that the creation of an Evolving Industry (“EI”) Customer Class is the best approach. *Id.* Dietz Decl. ¶¶ 4.2–4.8. While the EI Customer Class was formed in response to the unique challenges posed by the cryptocurrency industry, it is not limited to that industry and will be applied to any industry meeting the prescribed criteria. ECF 32-1 at 457–66.

On April 24, 2018, the Staff’s formal recommendation to establish an EI Customer Class and the proposed criteria to define industries included within the class were presented to the Commission in open public meeting.<sup>2</sup> Nordt Decl. ¶ 7.2. At the same time, Staff presented a plan to develop a new rate for the EI Customer Class, consistent with District policies and based upon a cost of service analysis. Nordt Decl. at Ex. 3; ECF No. 32-1 at 457-71.

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<sup>2</sup> These recommendations were also considered at an Evolving Industry Workshop on May 7, 2018.

1 Following this and other Staff analysis, on May 8, 2018, the  
2 Commission passed Resolution 8885 directing Staff to develop the EI  
3 Customer Class. Nordt Decl. Ex. 4.

4  
5 Following the adoption of Resolution 8885, Staff proceeded to finalize  
6 the criteria for the EI Customer Class and corresponding rates. Nordt Decl. ¶  
7 7.10. On June 26, 2018, Staff presented the criteria and rate for service to the  
8 Commission at another open public meeting. Nordt Decl. ¶¶ 7.12–7.13, Ex.  
9 5.

10  
11 **E. Plaintiffs Received Extensive Opportunity for Public Comment.**  
12

13 Plaintiffs and others received notice of the Commission's work and  
14 provided extensive comments throughout the process that led to development  
15 of RS 17. *Id.* at ¶¶ 8.1–8.4, Ex. 7. The Commission's business is conducted  
16 during meetings open to the public pursuant to Washington law. *Id.* The  
17 agenda, meeting materials, and presentations are posted on the District's  
18 website. *See, e.g.*, Johnson Ex. 1; Nordt Ex. 2; Ex. 5. During each meeting,  
19 any member of the public is welcome to address the Commission. Nordt  
20 Decl. ¶ 8.1. For example, during the June 26, 2018 Commission meeting,  
21 Plaintiff Cyline's representative and other members of the public engaged in  
22  
23

1 cryptocurrency mining commented on the proposed EI rates. *Id.* Staff also  
2 engaged in discussion with representatives of the cryptocurrency industry  
3 outside of Commission meetings. Lunderville Decl. ¶ 5.1. The District  
4 expressly invited written and oral comments on the proposed new rate  
5 schedule. Nordt Decl. ¶ 8.1.

6 During the public meeting on July 10, 2018, Staff presented a draft  
7 resolution for the Commission for review that would establish RS 17,  
8 including the rates EI customers would be charged. *Id.* at ¶ 8.2. The  
9 documents provided to the Commission detailed the Staff's extensive  
10 analysis and rationale for these recommendations. *Id.* at Ex. 6. At that  
11 meeting, the Commission accepted public comments on the proposed  
12 resolution. *Id.* at ¶ 8.2.

13 The Commission again took public comment at the July 24 and August  
14, 2018, meetings. *Id.* at ¶ 8.4. Plaintiffs' representatives provided oral and  
15 written comments. *Id.* at Ex. 7; Johnson Decl. Ex. 1. Between July 9 and  
16 August 14, 2018, Plaintiffs WeHash, Telco 214, Cytline, 509 Miners, and  
17 Mark Vargas, and Michael Ages of Plaintiff Fortress, all submitted written  
18 comments to the Commission. Nordt Decl. at Ex. 7.

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1       Throughout the development and implementation of RS 17, Staff  
 2 continued to work with Plaintiffs and the cryptocurrency industry to keep  
 3 them apprised of developments and potential impacts. *See generally Id.*;  
 4 Lunderville Decl. ¶ 5.1.

5       After considering Staff recommendations, along with the comments  
 6 submitted by the public, on August 28, 2018, the Commission unanimously  
 7 adopted RS 17 through Resolution 8891. Nordt Decl. ¶ 8.6, Ex. 9. In an  
 8 effort to address concerns about rate shock voiced by existing cryptocurrency  
 9 customers, the Commission phased in rate changes over three years, and  
 10 delayed the initial effective date to April 1, 2019.<sup>3</sup> *Id.* at ¶ 8.6. Additionally,  
 11 rates are based upon serving only 200 MW of new customer load, rather than  
 12 the total load of customers with completed service applications or the almost  
 13 2,000 MW represented by service inquires. *Id.* at ¶ 7.15.

14       The Commission's determination that the cryptocurrency industry is  
 15 subject to RS 17 is also subject to annual review. *Id.* at ¶¶ 8.10, 9.3; ECF No.  
 16

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17       <sup>3</sup> Contrary to Plaintiffs' assertions, the average difference of Plaintiffs' rates  
 18 under RS 7 and RS 17 is approximately 32% for the first year. Nolan Decl. ¶  
 19  
 20 5.4.

1 32-1 at 427–28. Additionally, during each annual review, certain elements of  
2 the rate, including the risk premium element, will be reviewed and may result  
3 in rate changes. Nordt Decl. ¶ 9.3, *See also* Ex. 6 at 91. The District  
4 anticipates these annual reviews will be initiated in late summer or early fall,  
5 with any Commission changes to the industries covered by RS 17, or the  
6 applicable rates, becoming effective the following April 1. *Id.* at Ex. 8 at 109.  
7 Importantly, the first annual review will begin in summer 2019. *Id.* During  
8 that review, Plaintiffs and any other stakeholder may submit comments. *Id.* at  
9 9.3. Any changes in covered industries or rates from this first annual review  
10 would be effective April 1, 2020. *Id.* Ex. 8.

14       **III. ARGUMENT**

15           **A. Preliminary Injunction is an Exceptional Remedy.**

16           A preliminary injunction is “an extraordinary and drastic remedy, one  
17 that should not be granted unless the movant, by a clear showing, carries the  
18 burden of persuasion.” *Idaho Rivers United v. United States Army Corps of*  
19 *Engineers*, 156 F.Supp.3d 1252, 1259 (W.D. Wash. 2015) (quoting *Mazurek*  
20 *v. Armstrong*, 520 U.S. 972 (1997) (italics in original)). The Ninth Circuit  
21 has warned that a preliminary injunction should not be issued lightly since  
22  
23

24  
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1 “[t]he grant of a preliminary injunction is the exercise of a very far reaching  
 2 power never to be indulged in except in a case clearly warranting it.” *Dymo*  
 3 *Indus., Inc. v. Tapeprinter, Inc.*, 326 F.2d 141, 143 (9th Cir.1964).

4

5 **B. Plaintiffs are Not Likely to Prevail on the Merits.**

6       **1. The Rate Schedule 17 rates are reasonable and lawful.**

7 Plaintiffs argue that the Commission’s adoption of RS 17 and its  
 8 associated rates are unlawfully discriminatory and excessive under both state  
 9 and federal law.<sup>4</sup> They accuse the District of violating both RCW  
 10 54.24.080(1) and Section 20 of the Federal Power Act. 16 U.S.C. § 813. For  
 11 the reasons below, they are wrong.

12

13       a. *The District has the full and exclusive authority to set rates*  
 14           *and its decisions are entitled to deference by this Court.*

15 RCW 54.16.040 and RCW 54.24.080(1) provide the District with the  
 16 “full and exclusive” authority to set both rates and terms and conditions of  
 17 service. Wash. Rev. Code 54.24.080(1). The District’s adoption of RS 17  
 18 was a lawful exercise of this authority. These statutes afford the Commission

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19

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21 <sup>4</sup> For the limited purpose of this Motion, Defendants address only those  
 22 arguments advanced by Plaintiffs in their Motion for a Preliminary  
 23 Injunction.

1 with broad authority to make rate decisions, and those decisions are  
 2 “presumptively reasonable.” *Irvin Water Dist. No. 6 v. Jackson P’ship*, 109  
 3 Wash. App. 113 (2001); *see also Wash. Manufactured Hous. Ass’n v. Pub.*  
 4 *Util. District No. 3 of Mason Cty*, 124 Wash.2d 381, 385 (1994), citing *Hillis*  
 5 *Homes, Inc. v. Public Util. Dist. I*, 105 Wash.2d 288, 298–300 (1986) (“rates  
 6 and charges are presumptively reasonable”). RS 17 benefits from this  
 7 presumption.

10 Furthermore, Washington courts reasonably defer to municipal utility  
 11 decisions. The Court in *Public Utility District No. 2 of Pacific County v.*  
 12 *Comcast of Washington IV, Inc.*, 184 Wash. App 24, 45 (2015) stated that  
 13 “[w]here ‘municipal utility actions come within the purpose and object of the  
 14 enabling statute and no express limitations apply,’ it is proper to leave ‘the  
 15 choice of means used in operating the utility to the discretion of municipal  
 16 authorities.’” 184 Wash. App 24, 45 (2015) (*quoting City of Tacoma v.*  
 17 *Taxpayers of City of Tacoma*, 108 Wash.2d 679, 695 (1987)). “Consistent  
 18 with its holding in City of Tacoma, our Supreme Court has shown deference  
 19 to an implementing entity where the governing statute delineated general  
 20 boundaries for proper rates.” *Id.* (*citing People’s Org. for Wash. Energy Res.*  
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DEFENDANTS’ MEMORANDUM IN  
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1       *v. Utils. & Transp. Comm'n*, 104 Wash.2d 798, 808, 823 (1985)  
 2 ("People's"). *Id.* Here, the Commission clearly acted within its authority  
 3 under RCW 54.24.080(1) and 54.16.040 to establish rate classes and set  
 4 rates. These decisions are presumptively reasonable and entitled to  
 5 deference.

7                  *b. The Commission's decisions are not arbitrary and*  
 8 *capricious.*

9       To overcome the presumption of legality described above, the Plaintiffs  
 10 must establish that the Commission's actions were "arbitrary and capricious."  
 11  
 12 *Public Util. Dis. No. 2 of Pacific Cty*, 184 Wash. App. at 45. This is an  
 13 exceptionally heavy burden of persuasion. *Greenen v. Wash. State Bd. of*  
 14 *Accountancy*, 126 Wash. App. 824, 830 (2005) ("the party challenging []  
 15 carries a heavy burden to persuade an appellate court that the [] decision is  
 16 erroneous") (quotations omitted); *In re Disciplinary Proceeding Against*  
 17 *Brown*, 94 Wash. App. 7, 16 (1999). A decision is arbitrary and capricious  
 18 only if it "is willful and unreasoning, taken without regard to the attending  
 19 facts or circumstances." *Wash. Independ. Tel. Ass'n v. Wash. Utils. & Transp.*  
 20  
 21 *Comm'n*, 149 Wash.2d 17, 26 (2003) (quoting *Rios v. Dep't of Labor &*  
 22  
 23 *Indus.*, 145 Wash.2d 483 (2002)) (internal quotations omitted). An "[a]ction

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1 is arbitrary and capricious where ‘there is no support in the record for the  
 2 action.’” *Dorsten v. Port of Skagit Cty.*, 32 Wash. App. 785, 793 (1982)  
 3 (*citing Barrie v. Kitsap Cy. Boundary Review Bd.*, 97 Wash.2d 232, 236  
 4 (1982)).  
 5

6 Under the arbitrary and capricious standard, the Commission’s decisions  
 7 must be sustained if the Court can reasonably “conceive of *any* state of facts  
 8 to justify that determination.” *Teter v. Clark Cty.*, 104 Wash.2d 227, 235  
 9 (1985) (emphasis in original) (*citing Ace Fireworks Co. v. City of Tacoma*,  
 10 76 Wash.2d 207, 210 (1969); *See Public Util. Comm’n of State of Cal. v.*  
 11 *United States*, 356 F.2d 236, 241 (9th Cir. 1966). “Where there is room for  
 12 two opinions, an action is not arbitrary or capricious when exercised honestly  
 13 and upon due consideration.” *Friends of Columbia Gorge, Inc. v. Wash.*  
 14 *State Forest Practices Appeals Bd.*, 129 Wash. App. 35, 57–58 (2005)  
 15 (quoting *Isla Verde Int’l Holdings, Inc. v. City of Camas*, 146 Wash.2d 740,  
 16 769 (2002)) (internal quotations omitted). Moreover, courts are not to  
 17 substitute their judgment for decisions of public entities. *State ex rel.*  
 18 *Rosenberg v. Grand Coulee Dam Sch. Dist. No. 301 J*, 85 Wash.2d 556, 563  
 19 (1975). Even a cursory review of the analysis and process that led to the  
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DEFENDANTS’ MEMORANDUM IN  
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1 adoption of RS 17 clearly shows that Plaintiffs are not likely to establish that  
2 the Commission's decisions were arbitrary and capricious. The  
3 Commission's decisions are reasonably based on the costs and risks  
4 associated with service to customers in the EI rate class at the requested  
5 volumes of service. Nordt Decl. ¶¶ 6.1–6.4; Ex. 2; Ex. 3; Ex. 5; Ex. 6; Nolan  
6 Decl. ¶ 4.2–4.4, 4.11–14; Dietz Decl. ¶¶ 4.1–5.3; Williams Decl. ¶¶ 4.2–4.4.  
7 Thus, there is no basis for this Court to substitute its judgment for that of the  
8 Commission in this case.

11                   *c. The EI Customer Class established via Rate Schedule 17 is  
12 not discriminatory.*

13                  The United States Supreme Court has observed that rate setting  
14 “involves judgment on a myriad of facts. It has no claim to an exact science.”  
15                  *Colorado Interstate Gas Co. v. Fed. Power Comm'n*, 324 U.S. 581, 589  
16 (1945), *reh'g denied*, 325 U.S. 891 (1945). Here, the District engaged in  
17 reasoned decision-making when it established RS 17 and when it decided  
18 that the cryptocurrency industry would be subject to it. While the Plaintiffs  
19 were previously provided service under RS 7, when faced with a flood of  
20 service requests from a new and unique industry, the District recognized it  
21 was entering unchartered territory and undertook a thorough review of its  
22  
23  
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DEFENDANTS' MEMORANDUM IN  
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1 options. Nordt Decl. ¶¶ 4.3, 6.1–6.3; ECF No. 32-1 at 457–66. The District  
2 determined that it lacked the grid infrastructure and electric power resources  
3 needed to serve the evolving cryptocurrency industry in Grant County based  
4 upon the volume of interest in electric service expressed by the industry.  
5 Nordt Decl. ¶ 6.7.

6  
7 The fact that the EI Customer Class was developed in response to the  
8 influx of service requests from the cryptocurrency industry does not  
9 constitute unlawful discrimination as the Plaintiffs suggest. ECF No. 25 at  
10 21–22. Should another industry present the same traits, the District fully  
11 intends to apply RS 17 to it. Nordt Decl. ¶ 8.10. Contrary to Plaintiffs'  
12 assertions, the Commission sought to strike a balance between protecting  
13 traditional customers and fairness to existing cryptocurrency customers,  
14 including Plaintiffs. *Id.* at ¶ 8.1.  
15  
16

17 Plaintiffs also wrongly assert that District Staff, and not the  
18 Commission, determines which customers are in EI Customer Class. ECF  
19 No. 25 at 24–25. While the Staff will annually conduct an initial review, its  
20 conclusions are ultimately subject to review by the Commission. Nordt Decl.  
21  
22  
23  
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DEFENDANTS' MEMORANDUM IN  
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¶ 8.10, ¶ 9.3; Ex. 8 at 109. The Commission is not required to accept the Staff's recommendation. *See Id.* Wash. Rev. Code 54.16.040, 54.24.080.

*d. The rates established under Rate Schedule 17 are based on reasonable analysis and decision making.*

Existing rate schedules were not designed to address the rapid increases or decreases of electricity demand associated with the cryptocurrency industry. ECF No. 32-1 at 457–58. RS 7 rates were based on assumptions about historic retail power demand and the cost of operating and maintaining the power system as is—not the future costs of operating and maintaining a system supporting the volume of interest in electric service the District received from the cryptocurrency industry. *Id.*; Nolan ¶ 4.18; Nordt Decl. ¶ 6.3. To fairly allocate the District's costs to serve the new demand associated with the cryptocurrency industry, the Commission adopted RS 17. Nordt Decl. ¶ 6.6, Ex. 9; ECF No. 32-1 at 427–29, 457–71, 496–97.

Plaintiffs' reliance upon the conclusory analysis of a single witness, ECF No. 26, to challenge the outcome of the District's multidisciplinary process that resulted in the adoption of RS 17 is unavailing. *See generally* Nolan Decl. ¶¶ 4.1–4.22; Dietz Decl. ¶¶ 5.1–5.5; Lunderville Decl. ¶¶ 6.1–6.2, Williams Decl. ¶¶ 4.1–4.20. Plaintiffs dispute the District's cost of

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1 service analysis and would prefer a different approach. ECF No. 25 at 25.  
 2 They argue that RS 17 fails to apply the same rates to customers that are  
 3 indistinguishable from cryptocurrency customers on a cost of service basis.  
 4 *Id.* While cryptocurrency customers share some traits with other customers  
 5 in the District service area, Plaintiffs fail to account for the unique features of  
 6 the cryptocurrency industry, particularly the volatility of cryptocurrency  
 7 prices and the mobility of cryptocurrency operations. Nolan Decl. ¶¶ 4.2,  
 8 4.12; Nordt Decl. ¶ 6.6, ¶ 7.5, Ex. 3 at 68–70.

11 Plaintiffs also incorrectly suggest that rates must be based on “scientific  
 12 analysis.” In this regard, Plaintiffs repeatedly misrepresent the holdings in  
 13 *Lincoln Shiloh*. See ECF No. 25 at 26. *Lincoln Shiloh Assocs., Ltd. v.*  
 14 *Mukilteo Water Dist.*, 45 Wash. App. 123, 129–30 (1986). *Lincoln* imposes  
 15 no such requirement.<sup>5</sup> In fact, contrary to the Plaintiffs’ misrepresentations,  
 16  
 17  
 18  
 19

---

20 <sup>5</sup> *Lincoln* holds that a public utility district may classify its customers into  
 21 different classes and allocate different charges to those classes of customers  
 22 as long as the basis for the classification is reasonable and nondiscriminatory.  
 23 45 Wash. App. at 129–30. While a statistical analysis can be one reasonable  
 24  
 25

1 the Supreme Court of Washington has held that “only a *practical* basis for  
 2 the rates is required, not mathematical precision.” *Teter*, 104 Wash.2d at 238  
 3 (emphasis in original).

4 Plaintiffs further incorrectly assert that the RS 17 rates are not cost  
 5 based. ECF No. 25 at 26–28. The rates incorporate both direct and indirect  
 6 costs. Dietz Decl. ¶¶ 5.1–5.5; Nolan Decl. ¶¶ 4.7–4.9, 4.19–4.22; Williams  
 7 Decl. ¶¶ 4.4–4.17. Furthermore, the rates appropriately incorporate the costs  
 8 the District will incur to service an influx of cryptocurrency customers. Dietz  
 9 Decl. ¶¶ 5.1–5.5; Nolan Decl. ¶¶ 4.2–4.5; Williams Decl. ¶ 4.5. Finally,  
 10 Plaintiffs wrongly argue that the challenged rates violate common rate  
 11 making principles. ECF No. 25 at 28. Staff determined that the rates were  
 12 consistent with common rate making principles and reviewed the rate for  
 13 consistency with District policies. Nolan Decl. ¶¶ 4.2, 4.6, Williams Decl. ¶¶  
 14 4.2–4.3 In light of the District’s reasoned decision making, the Plaintiffs  
 15 cannot establish that RS 17 was adopted arbitrarily and capriciously.

---

21  
 22 basis for setting rates, the Court did *not* hold that providing such evidence is  
 23 the “only” basis for setting rates. *Id.*  
 24

25 DEFENDANTS’ MEMORANDUM IN  
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1                   e. Plaintiffs will not prevail on their Federal Power Act claim.

2                   Plaintiffs assert that the District violated section 20 of the Federal Power  
 3                   Act, and that such violation is a basis for this court to grant a preliminary  
 4                   injunction. ECF No. 25 at 24 n. 52. The Federal Energy Regulatory  
 5                   Commission (“FERC”), the agency responsible for administering Part I of  
 6                   the Federal Power Act including section 20, has held that section 20 of the  
 7                   Federal Power Act does not apply to the District. In *The Yakama Nation v.*  
 8                   *Public Util. Dist. No. 2 of Grant Cty., WA*, Project No. 2114-106, Order on  
 9                   Complaint 2002 WL 31990298 (2002), the Commission reviewed the history  
 10                  of sections 19 and 20 of the Federal Power Act and concluded that because  
 11                  the District is a municipal entity to which the state has expressly granted self-  
 12                  regulatory authority, “Sections 19 and 20 do not apply to it.” *Id.* at \*4.  
 13                  Applying this reasoning, Plaintiffs cannot establish that Defendants violated  
 14                  the statute.

19                  **2. Plaintiffs will not succeed on their claim under the Due  
 20                  Process Clause of the United States Constitution.**

21                  Courts undertake a two-step analysis to determine whether a plaintiff  
 22                  has successfully asserted a Due Process Clause violation. The court first asks  
 23                  whether there was a deprivation of a constitutionally protected liberty or  
 24

1 property interest. If so, the court then considers if there was a denial of that  
 2 interest without adequate procedural protections.

3           *a. Plaintiffs do not have a constitutionally protected  
 4 property interest in their current electricity rate.*

5 To state a claim under the Due Process Clause, a plaintiff must first  
 6 establish the possession of a “property interest” that is deserving of a  
 7 constitutional protection. *Brewster v. Bd. of Educ. Of Lynwood Unified Sch.*  
 8 *Dist.*, 149 F.3d 971, 982 (9th Cir. 1998); *Gilbert v. Homar*, 520 U.S. 924,  
 9 928 (1997). Plaintiffs have no such right. The Supreme Court has held that  
 10 utility customers have no vested rights in any particular utility rates under the  
 11 United States Constitution. *Wright v. Cent. Kentucky Nat. Gas Co.*, 297 U.S.  
 12 537, 542 (1936).

13           *b. Plaintiffs were afforded ample opportunities to make their  
 14 views known.*

15 As an initial matter, the function of rate making is legislative in nature.  
 16 As such, ratepayers have no constitutional right to participate. In any event,  
 17 the District afforded Plaintiffs the ability to be heard and participate in the  
 18 process that resulted in RS 17.

19 As discussed above, the District’s Commissioners have the exclusive  
 20 authority to set rates for electric service under Washington law. The  
 21

1 Washington State Supreme Court has acknowledged that the state of  
 2 Washington delegated rate making authority to agencies and “direct[s] them  
 3 to set those rates which [they] determine to be just and reasonable.”  
 4 *People’s*, 104 Wash.2d at 807. Accordingly, the Court found that the  
 5 “function of rate making is legislative in character.” *Id.* Because setting rates  
 6 is a legislative function, the constitutional right to participate does not attach.  
 7  
 8 *See Pub. Utils. Comm’n of State of Cal.*, 356 F.2d at 241.

10 Although the Plaintiffs were not entitled to it, the record demonstrates  
 11 that they were afforded ample notice and opportunity to be heard throughout  
 12 the development of RS 17. *See generally* Nordt Decl. Ex. 7, Johnson Decl.  
 13 Ex. 1 at 5; Lunderville Decl. ¶ 5.1. The public was given regular updates and  
 14 opportunities to be heard through workshops, open meetings, individualized  
 15 meetings with stakeholders—including many of the Plaintiffs—District  
 16 website postings, and opportunities to submit written comments. Lunderville  
 17 Decl. ¶ 5.1; Nordt Decl. ¶¶ 8.1, 8.4, ECF No. 32-1 at 10–16. Plaintiffs  
 18 availed themselves of these opportunities and provided comments to the  
 19 District on multiple occasions. *See generally* Nordt Decl. Ex. 7; Johnson  
 20 Decl. Ex. 1 at 5.

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 25 DEFENDANTS’ MEMORANDUM IN  
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1 Plaintiffs do not have any valid due process claim; they simply object to  
2 the outcome. They erroneously claim that the implementation of RS 17  
3 violates basic principles of due process by allowing District Staff to make  
4 decisions about whether an entity is or is not classified as an Evolving  
5 Industry. ECF No. 25 at 30–33. Within RS 17, the Commission provided  
6 for, among other things, an annual review. Nordt Dec. ¶ 9.3, Ex. 8, Ex. 9 at  
7 113–15. District Staff will undertake this analysis, and present its  
8 conclusions, with any recommendations for changes, to the Commission for  
9 consideration. *Id.* at ¶ 9.3, Ex. 8. Moreover, Staff’s authority to perform rate  
10 analysis and to implement a rate is not unlawful. *Jeffers v. City of Seattle*, 23  
11 Wash. App. 301, 309 (1979); *Murray v. Shanks*, 27 Wash. App. 363, 366–67  
12 (1980). But, ultimately, it is the Commission that determines the industries  
13 that fall under RS 17 and the rates they will pay. Nordt Decl. ¶ 9.1, ¶ 9.3, Ex.  
14 8.  
15  
16  
17  
18

19           **3. Plaintiffs will not prevail on their claim under Article I,  
20           Section 12 of the Washington Constitution.**

21           The Plaintiffs will not prevail on their claims under Article I, § 12 of the  
22 Washington State Constitution because their assertions misrepresent the  
23 purpose of this section and are based upon inaccurate underlying facts. It has  
24  
25

1 been held that “[t]he aim and purpose of [Article I, §12] is to secure equality  
2 of treatment to all persons without undue favor on one hand or hostile  
3 discrimination on the other.” *Geneva Water Corp. v. City of Bellingham*, 12  
4 Wash. App. 856, 863 (1975). In order to comply with this aim and purpose,  
5 “the legislation under examination [must] apply alike to all persons within a  
6 class, and reasonable ground must exist for making a distinction between  
7 those within and those without a designated class.” *Id.* As explained above,  
8 RS 17 will apply to all entities that fall within the EI Customer Class in a  
9 non-discriminatory manner. Nordt Decl.¶ 7.8. It is the Plaintiffs’ burden to  
10 prove that the rates are discriminatory. *Geneva Water Corp.*, at 865. None of  
11 the case law cited by Plaintiffs holds that setting different rates for different  
12 classes of customers is itself impermissibly discriminatory. A utility may  
13 discriminate on the basis of price as long as there are reasonable grounds for  
14 doing so and a “just relation to the subject-matter of the act in respect to  
15 which the classification is made.” *State ex rel. Bacich v. Huse*, 187 Wash.  
16 75, 83–84 (1936), *overruled on other grounds by Puget Sound Gillnetters*  
17 *Ass’n v. Moos*, 92 Wash. 2d 939 (1979).

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1 As discussed in Section II.B(2)(c), the Commission had reasonable  
 2 grounds for promulgating RS 17 and setting separate rates for the EI  
 3 Customer Class. For these reasons, Plaintiffs' claims pursuant to Article I, §  
 4 12 of the Washington state constitution must fail.  
 5

6 **C. Any Harm to Plaintiffs is Not Irreparable and Imminent.**

7 Plaintiffs assert that they will suffer monetary damages if subjected to  
 8 RS 17 prior to a final judgment in this case. Monetary injuries are generally  
 9 not irreparable. *See L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*,  
 10 634 F.2d 1197, 1202 (9th Cir. 1980). Furthermore, the District will refund  
 11 the difference in the rate paid under RS 17 in the unlikely event Plaintiffs  
 12 prevail. Nordt Decl. ¶ 10.1, Ex. 10 at 122–23.  
 13

14 Plaintiffs' claim potential bankruptcy and the loss of investments, but  
 15 these claims are self-serving and are not imminent. The mere possibility of  
 16 harm is not sufficient to show likely irreparable injury. *See Enyart v. Nat'l*  
 17 *Conf. of Bar Exam'rs Inc.*, 630 F.3d 1153, 1165 (9th Cir. 2011). Moreover,  
 18 Plaintiffs overstate the scale of the imminent rate change. The rate change to  
 19 take effect April 1, 2019 will increase Plaintiffs' rates approximately 32%.  
 20  
 21 Nolan Decl. ¶ 5.4.  
 22  
 23

1                   **D. The Equities Weigh in Favor of the District.**

2                   RS 17 was adopted out of necessity. Nordt Decl. ¶ 6.1. RS 7 was not  
 3                   adequate to cover the costs of serving the evolving industries given the  
 4                   volume of service requests received from the cryptocurrency industry. *Id.*  
 5  
 6                   The rush of requests exposed serious deficiencies in the District's current  
 7                   customer connection policies, procedures, rate design, and facility cost  
 8                   contribution formulae when applied to risks inherent in the cryptocurrency  
 9                   industry. *Id.* ECF No. 457–471. After a year-long process of inquiry and  
 10                  careful consideration of all the alternatives, the District adopted RS 17. Nordt  
 11                  Decl. ¶¶ 6.1–8.8 (detailing the year long process); Dietz Decl. ¶¶ 4.1–4.8  
 12                  (same).

15                  Washington law requires the Commission to set rates that are “adequate  
 16                  to provide revenues sufficient for the payment of the principal of and interest  
 17                  on . . . revenue obligations . . . and for the proper operation and maintenance  
 18                  of the public utility and all necessary repairs, replacements and renewals.”  
 19                  Wash. Rev. Code 54.24.080(1). An injunction will hamper the District’s  
 20                  ability to collect revenues as required by Washington law.  
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1                   **E. A Preliminary Injunction is Not in the Public Interest.**

2                   “In exercising their sound discretion, courts of equity should pay  
 3 particular regard for the public consequences in employing the extraordinary  
 4 remedy of injunction.” *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24  
 5 (2008) (discussing whether a preliminary injunction should be granted)  
 6 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). An  
 7 injunction will not be granted unless the public interests in favor of granting  
 8 an injunction “outweigh other public interests that cut in favor of *not* issuing  
 9 the injunction.” *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138  
 10 (9th Cir. 2011) (emphasis in original).

11                  The District is a public utility district, authorized by state law, and  
 12 governed by duly elected Commissioners. The Commission’s actions are  
 13 taken in pursuit of the public interest, consistent with the directives in  
 14 Washington law. *See, e.g.*, Wash. Rev. Code 54.16.040; .080.

15                  As a practical matter, an injunction against Customer Classification and  
 16 rate setting would shift rate making authority from an elected commission to  
 17 this Court, contrary to Washington law. The District must be able to engage  
 18 in lawful rate making without the threat of undue judicial intervention.

1                   **F. Plaintiffs Must Provide Security if a Preliminary Injunction is  
2 Granted.**

3                   Rule 65(c) of the Federal Rules of Civil Procedure provides that a  
4 district court may grant a preliminary injunction “only if the movant gives  
5 security in an amount that the court considers proper to pay the costs and  
6 damages sustained by any party found to have been wrongfully enjoined or  
7 restrained.” The court retains continuing discretion as to the amount of bond,  
8 if any, but should consider the realistic likelihood of harm to an enjoined  
9 party when considering the amount of the bond. *Diaz v. Brewer*, 656 F.3d  
10 1008, 1015 (9th Cir. 2011).

11                  In the unlikely event that this Court grants Plaintiffs’ request for a  
12 preliminary injunction, the appropriate security is a bond in the amount of  
13 \$647,646.23. This amount is based on the difference between the rates  
14 assessed under RS 17 and RS 7 during the period April 1, 2019, to the  
15 anticipated trial date on or about March 31, 2020. Using each of the  
16 Plaintiffs’ electricity consumption in 2018, Staff calculated the average  
17 amount Plaintiffs paid the District for service in 2018 under RS 7. Nordt  
18 Decl. ¶ 10.3. Staff then calculated the annual charge under the first year of  
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1 RS 17 (April 1, 2019—March 31, 2020). *Id.* The difference between charges  
 2 under RS 7 (2018) and RS 17 (2019) is the amount requested.<sup>6</sup>

3 **IV. CONCLUSION**

4 For the reasons set forth above, the Plaintiffs fail to meet the criteria  
 5 necessary for granting the Motion for Preliminary Injunction, and therefore  
 6 the Motion must be denied.

7  
 8 DATED this 1st day of March, 2019.

9  
 10 VAN NESS FELDMAN LLP

11  
 12 /s/ Dale N. Johnson  
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*Attorneys for Defendants*

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<sup>6</sup> See Nordt Decl. Ex. 11, at 125–29, for a detailed explanation of the rates assessed under RS 17 and RS 7.

## **CERTIFICATE OF SERVICE**

I hereby certify that on March 1, 2019, I electronically filed the foregoing (and the documents listed below) with the Clerk of the Court using CM/ECF System, which in turn automatically generated a Notice of Electronic Filing (NEF) to all parties in the case who are registered users of the CM/ECF system. The NEF for the foregoing specifically identifies recipients of electronic notice.

- Defendants' Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction;
  - Declaration of Dale Johnson with Exhibits 1-2;
  - Declaration of Kevin Nordt with Exhibits 1-11;
  - Declaration of Jeremy Nolan with Exhibit 1;
  - Declaration of Devon Williams;
  - Declaration of Shane Lunderville;
  - Declaration of Paul Dietz;
  - [Proposed] Order Denying Plaintiffs' Motion for Preliminary Injunction [judge only]; and [this]
  - Certificate of Service.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

**CERTIFICATE OF SERVICE - 1**



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1 EXECUTED at Seattle, Washington on this 1st day of March, 2019.  
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/s/ Amanda C. Kleiss  
Declarant

CERTIFICATE OF SERVICE - 2



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